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Patent
Attorney Docket No. GEMS8081.231

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of : Brau et al.
Serial No. : 10/711,892
Filed : October 12, 2004
For : METHOD AND SYSTEM OF DETERMINING MOTION IN A
REGION-OF-INTEREST DIRECTLY AND INDEPENDENTLY OF
K-SPACE TRAJECTORY
Group Art No. : 3737
Examiner : John Fernando Ramirez

CERTIFICATION UNDER 37 CFR 1.8(a) and 1.10

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**RENEWED PETITION UNDER 37 C.F.R. 1.137(a) REQUESTING
REVIVAL OF AN UNAVOIDABLY ABANDONED APPLICATION**

Dear Sir:

Responsive to the Decision on Petition mailed December 11, 2008, and in view of the Notice of Abandonment mailed July 29, 2008, Applicant hereby renews the Petition under 37 C.F.R. 1.137(a) requesting revival of the unavoidably abandoned application for the reasons set forth below.

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REMARKS

INTRODUCTION:

Applicant received a Notice of Abandonment mailed July 29, 2008 in the present application, the Notice stating that Applicant's attorney, undersigned, "confirmed that he didn't file a response to the last office action of 05/30/2008." However, the referenced "Office Action" of May 30, 2008 was actually an Advisory Action mailed by the PTO after the 6 month period for reply to the Final Office Action mailed September 13, 2007. In fact, Applicant did indeed timely file an After-Final Reply on November 13, 2007, two months after the Final Office Action. Since Applicant timely filed the response within two months of the Final Office Action, Applicant was entitled to a timely Advisory Action, as is set forth in MPEP 706.07(f). However, as the Advisory Action was not mailed until May 30, 2008 (more than six months after the Final Office Action), the PTO clearly failed to promptly respond to Applicant's After-Final Reply, and the application was effectively abandoned *before* the mailing of the Advisory Action mailed May 30, 2008.

In response to the Notice of Abandonment, Applicant promptly filed a Petition under 37 C.F.R. 1.137(a) requesting revival of the unavoidably abandoned application on July 30, 2008. In a Decision on Petition mailed December 11, 2008, the Petition was dismissed, and details lacking in the Petition were set forth. Therefore, Applicant hereby renews the Petition under 37 C.F.R. 1.137(a) and again seeks revival of the application based on unavoidable delay for the following reasons.

DETAILED RESPONSE:

Firstly, is should be recalled that the MPEP sets forth the basic standard for finding "unavoidable":

The word 'unavoidable' . . . is applicable to ordinary human affairs, and requires no more or greater care or diligence than is generally used and observed by prudent and careful men in relation to their most important business. It permits them in the exercise of this care to rely upon the ordinary and trustworthy agencies of mail and telegraph, worthy and reliable employees, and such other means and instrumentalities as are usually employed in such important business. If unexpectedly, or through the unforeseen fault or imperfection of these agencies and instrumentalities, there occurs a failure, it may properly be said to be unavoidable, all other conditions of promptness in its rectification being present. *In re Mattullah*, 38 App. D.C. 497, 514-15 (1912)(quoting *Pratt*, 1887 Dec. Comm'r Pat. 31,

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32-33 (1887)); see also *Winkler v. Ladd*, 221 F. Supp. 550, 552, 138 USPQ 666, 667-68 (D.C. 1963), *aff'd*, 143 USPQ 172 (D.C. Cir. 1963); *Ex parte Henrich*, 1913 Dec. Comm'r Pat. 139, 141 (1913).

MPEP §711.03(c)(II)(C)(2). According to the MPEP:

In addition, decisions on revival are made on a "case-by-case basis, taking all the facts and circumstances into account." *Smith v. Mossinghoff*, 671 F.2d 533, 538, 213 USPQ 977, 982 (D.C. Cir. 1982).

Id.

In this case, it was not simply an error on the part of an employee in the performance of a mere clerical function. While it is true that there was a clerical error, in this case, the error only manifested itself because of reliance upon the actions, or inactions in this case, of what is ordinarily a trustworthy agency – the Patent Office. The failure to send an Advisory Action, as required by office procedure when After-Final Responses are filed within 2 months of the Final Office Action, played a role in the abandonment of the subject application and cannot be discounted.

The Office clearly failed to fairly and promptly consider the amendment after-final filed November 13, 2007. Per the MPEP, "[r]eplies after final should be processed and considered promptly by all Office personnel." *MPEP 706.07(f)(I)*. The Examiner(s) did not promptly consider the after-final amendment of November 13, 2007, as Applicant did not receive an Advisory Action until more than six months after the Final Office Action, at which point the application was already effectively abandoned. Presumably, either the former examiner neglected to timely reply, or, perhaps due to reassignment, the Office erred in its timely calendaring/docketing and/or reassignment of this case. In either instance, the Applicant has fallen victim to an unreasonable and unavoidable delay by the Office, and Office procedure was clearly not followed in responding to the After-Final Response filed November 13, 2007. Thus, despite the docketing error, the abandonment at issue could have been avoided had Office policy been adhered to in this case. The undersigned therefore requests that this lapse in adhering to Office policy not be discounted and be given favorable consideration in deciding the outcome of this Renewed Petition.

Secondly, in the December 11, 2008 Decision on Petition dismissing the July 30, 2008 Petition, it was noted by the Petitions Examiner that:

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A delay resulting from an error (e.g., a docketing error) on the part of an employee in the performance of a clerical function may provide the basis for a showing of "unavoidable" delay, provided it is shown that: (1) the error was the cause of the delay at issue; (2) there was in place a business routine for performing the clerical function that could reasonably be relied upon to avoid errors in its performance; (3) and the employee was sufficiently trained and experienced with regard to the function and routine for its performance that reliance upon such an employee represented the exercise of due care. See MPEP 711.03(c)(II)(C)(2).

Decision on Petition, December 11, 2008, pp. 1-2, (emphasis added). Regarding the July 30, 2008 Petition under 37 C.F.R. 1.137(a), the Petitions Examiner stated that:

Petitioner does not provided [sic] information regarding the training provided to the personnel responsible for the docketing error, including the degree of supervision of their work, examples of other work functions carried out, and checks on the described work which were used to assure proper execution of assigned tasks.

Id. at 2. Accordingly, this Renewed Petition includes herewith signed Declarations (Exhibits E-G) setting forth information in support of that information identified by the Petitions Examiner as having not been provided. That is, the Declarations attest to the training and supervision provided to the docketing personnel with regard to the docketing procedures and software used. The degree of training and supervision of the work performed are set forth as well as the supervision regarding the proper execution of the assigned tasks. Reliance on our docketing personnel to perform the assigned docketing tasks following the training is also set forth. Further, examples of other, non-docketing work functions carried out are provided.

Therefore, for at least the reasons set forth in the original Petition under 37 C.F.R. 1.137(a) along with the reasons set forth in this Renewal Petition, Applicant respectfully requests revival of the unavoidably abandoned subject application.

A reply in compliance with the requirements of 37 C.F.R. 1.137(a) and the fee set forth in § 1.17(l) were previously filed.

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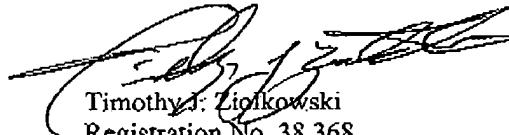
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In order to expedite this Renewed Petition and entry of Applicant's RCE, Applicant cordially invites Office personnel to telephone the undersigned for any clarification in order to favorably resolve and grant this Renewed Petition.

Respectfully submitted,



Timothy J. Ziolkowski
Registration No. 38,368
Direct Dial 262-268-8181
tjz@zpspatents.com

Dated: February 11, 2009
Attorney Docket No.: GEMS8081.231

P.O. ADDRESS:

Ziolkowski Patent Solutions Group, SC
136 South Wisconsin Street
Port Washington, WI 53074
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EXHIBIT E

Patent
Attorney Docket No. GEMS8081.231

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of : Brau et al.

Serial No. : 10/711,892

Filed : October 12, 2004

For : METHOD AND SYSTEM OF DETERMINING MOTION IN A
REGION-OF-INTEREST DIRECTLY AND INDEPENDENTLY OF
K-SPACE TRAJECTORY

Group Art No. : 3737

Examiner : John Fernando Ramirez

**DECLARATION BY THE SUPERVISOR OF THE DOCKETING SPECIALIST
IN SUPPORT OF RENEWED PETITION TO REVIVE ABANDONMENT
UNDER 37 C.F.R. 1.137(a)**

I, Timothy J. Ziolkowski, being duly sworn, depose and say that I am the managing partner of Ziolkowski Patent Solutions Group, SC, patent practitioners for the above-identified Patent Application. My duties include the supervision of all work performed by the employees of Ziolkowski Patent Solutions Group, SC, including that of the docketing specialists, Gregory V. Madden and Stephanie M. Laundre. I hereby attest to the fact that Mr. Madden was trained and supervised, under my direction, by a previous docketing specialist, Stephanie M. Laundre. Ms. Laundre was well-trained and experienced in all aspects of the docketing system utilized by Ziolkowski Patent Solutions Group, SC. Based on Mr. Madden's increased proficiency and experience with all aspect of docketing throughout the training, Mr. Madden assumed the docketing responsibilities at the end of the training and was relied upon to perform such duties. Further, as Mr. Madden was a former Patent Examiner with the USPTO for more than two and a half years, and based on my personal experience of working with Mr. Madden, I can attest to the fact that Mr. Madden was well versed in the appropriate deadlines for response to various Office communications and Office Actions.

Both of these docketing specialists have done stellar work with no other known errors. However, despite all training, supervision, and due care on our part for our docketing personnel,

EXHIBIT E

INVENTOR: Brau, et al.

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an error was made when docketing the Final Office Action mailed September 13, 2007 for the above-referenced Patent Application, failing to check a box on the software that provides a warning of the six-month deadline for reply for this Office Action. It is our docketing policy to note the six-month deadline for reply for every final office action received by our firm.

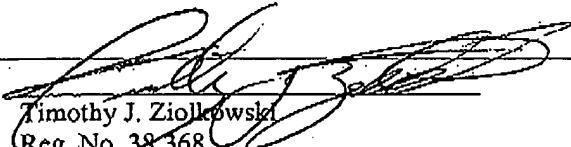
In my approximately 15 years of practicing before the USPTO, I had not before experienced a case where the PTO failed to provide the required Advisory Action by the 6th month date where the Applicant filed an After-Final Reply within 2 months of the issuance of the Final Office Action.

Applicant's failure to timely submit another reply (RCE or Appeal) to the Final Office Action of September 13, 2007 was directly attributable to the clerical error made by docketing personnel of Ziolkowski Patent Solutions Group, SC, in conjunction with the absence of an Advisory Action, despite all due care on the part of Ziolkowski Patent Solutions Group, SC. As a direct result of the error, the above-referenced Patent Application went abandoned due to the unavoidable delay in responding to the Final Office Action of September 13, 2007.

I have not experienced this docketing error by either of our docketing specialist, nor has it occurred since.

I swear that the statements made herein are of my own knowledge and are true and made on information and belief that are believed to be true.

I acknowledge that any willful false statements and the like made herein are punishable by fine or imprisonment, or both, and may jeopardize the validity of the application or any patent issuing thereon.


Timothy J. Ziolkowski
Reg. No. 38,368

Dated: February 11, 2009

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Group Art No. : 3737
Examiner : John Fernando Ramirez

**DECLARATION BY THE TRAINER OF THE DOCKETING SPECIALIST IN
SUPPORT OF RENEWED PETITION TO REVIVE ABANDONMENT
UNDER 37 C.F.R. 1.137(a)**

I, Stephanie M. Laundre, being duly sworn, depose and say that I am an employee with Ziolkowski Patent Solutions Group, SC, patent practitioners for the above-identified Patent Application. My previous duties included the training of the current docketing specialist, Gregory V. Madden, and the supervision and review of docketing work performed by Mr. Madden. Specifically, over a two-month period, I trained Mr. Madden on all aspects of Ziolkowski Patent Solutions Group's docketing system. Mr. Madden's training including in-depth training with the docketing software and a detailed explanation of docketing procedures.

At the beginning of the training period, I demonstrated the correct docketing procedures to Mr. Madden. During this period of training, Mr. Madden observed the docketing procedures for every item that I entered into the docketing system. As training progressed and Mr. Madden's proficiency with the docketing system increased, Mr. Madden took over the task of entering docketing information into the docketing system. After Mr. Madden completed entering the docketing information, I performed a careful review of each docketed item to check for errors in Mr. Madden's docketing procedures. If docketing errors were present, I made detailed notes regarding these errors, discussed each error with Mr. Madden, and ensured that Mr. Madden

EXHIBIT E

INVENTOR: Brau, et al.

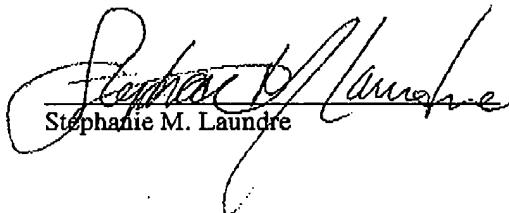
S/N: 10/711,892

understood the correct docketing procedure to prevent similar errors in his subsequent docketing work.

I attest to the fact that I am well-trained and experienced in all aspects of the docketing system utilized by Ziolkowski Patent Solutions Group, SC. I further attest to the fact that I sufficiently trained and supervised Mr. Madden in all aspects of the patent practitioner's docketing system and protocol. At the end of training and supervision of Mr. Madden, Mr. Madden was experienced in the docketing routine and docketing software utilized by the patent practitioners and assumed the role of docketing from me. Further, as Mr. Madden was a former Patent Examiner with the USPTO, I attest to the fact that Mr. Madden was well versed in the appropriate deadlines for response to various Office communications and Office Actions.

I swear that the statements made herein are of my own knowledge and are true and made on information and belief that are believed to be true.

I acknowledge that any willful false statements and the like made herein are punishable by fine or imprisonment, or both, and may jeopardize the validity of the application or any patent issuing thereon.



Stephanie M. Laundre

Dated: 2/11/09

FEB 11 2009

EXHIBIT G

Patent
Attorney Docket No. GEMS8081.231

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

In re Application of : Brau et al.
Serial No. : 10/711,892
Filed : October 12, 2004
For : METHOD AND SYSTEM OF DETERMINING MOTION IN A
REGION-OF-INTEREST DIRECTLY AND INDEPENDENTLY OF
K-SPACE TRAJECTORY
Group Art No. : 3737
Examiner : John Fernando Ramirez

**DECLARATION BY THE PRACTITIONER'S DOCKETING SPECIALIST IN
SUPPORT OF RENEWED PETITION TO REVIVE ABANDONMENT
UNDER 37 C.F.R. 1.137(a)**

I, Gregory V. Madden, being duly sworn, depose and say that I am an employee of Ziolkowski Patent Solutions Group, SC, patent practitioners for the above-identified Patent Application. My duties as an employee of Ziolkowski Patent Solutions Group, SC include the docketing of all incoming and outgoing correspondence with the United States Patent and Trademark Office. I am primarily responsible for these duties and it is a primary function of my full-time employment with the firm.

Prior to my employment at Ziolkowski Patent Solutions Group, SC, I was a Patent Examiner with the USPTO (Art Unit 2622) for more than two and a half years. As such, I am very well trained and experienced in recognizing the appropriate deadlines for response to various Office communications and Office Actions, including the six-month deadline for reply to Office Actions.

At the onset of my employment with Ziolkowski Patents Solutions Group, SC, I was trained extensively on the docketing system and routine employed by the firm. The training was provided by the previous docketing specialist, Stephanie M. Laundre. This training included a thorough review of the docketing routine for all incoming Office Actions, including Final Office Actions, and the appropriate deadlines for filing a response to those Office Actions. The training

EXHIBIT G

INVENTOR: Brau, et al.

S/N: 10/711,892

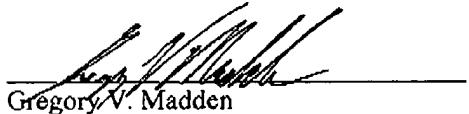
also involved a tutorial on the docketing software utilized by the firm. Ms. Laundre also reviewed all docketing entries made by me during my training, assuring that the entries were accurate and in compliance with the docketing routine in place.

In addition to my docketing duties, I am also experienced in the preparation of letters and other correspondence to be signed by attorneys related to the preparation and prosecution of patent applications before the USPTO, including reminders to clients regarding upcoming deadlines for response to outstanding Office Actions.

Therefore, I attest to the fact that I received sufficient training in the docketing routine employed by the firm, and the work I performed during my training was thoroughly checked by the previous docketing specialist, Ms. Laundre.

I swear that the statements made herein are of my own knowledge and are true and made on information and belief that are believed to be true.

I acknowledge that any willful false statements and the like made herein are punishable by fine or imprisonment, or both, and may jeopardize the validity of the application or any patent issuing thereon.



Gregory V. Madden

Dated: 2/11/09